PAUL C. KOHLMAN

IBLA 87-152 Decided September 28, 1989

Appeal from a decision of the Montana State Office, Bureau of Land Management, denying in part and granting in part a request for suspension of operations and production on oil and gas leases M-25212, M-25213, M-25215, M-27722, and M-27723.

Affirmed.

1. Oil and Gas Leases: Suspensions

> When the Secretary directs or consents to a suspension of operations and production in the interest of conser-vation under sec. 39 of the Mineral Leasing Act of 1920, 30 U.S.C. § 209 (1982), the lessee is denied all beneficial use of the lease during the period of suspension. The existence of litigation involving whether an oil and gas lease was issued in violation of the National Environmental Policy Act, 42 U.S.C. || 4321-4334 (1982), and sec. 7 of the Threatened and Endangered Species Act, 16 U.S.C. § 1539 (1982), does not amount to the denial of beneficial use of the lease, absent an injunction against activity under the lease. In such a case, BLM properly denies a request for a suspension.

APPEARANCES: Constance E. Brooks, Esq., and Matthew Y. Biscan, Esq., Mountain States Legal Foundation, Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Paul C. Kohlman has appealed from the October 15, 1986, decision of the Montana State Office, Bureau of Land Management (BLM), denying an applica-tion for suspension of operations and production retroactive to the date of lease issuance, and for a refund of annual rentals paid from that date, on oil and gas leases M-25212, M-25213, M-25215, M-27722, and M-27723. These leases embrace lands within a roadless area known as Deep Creek/Reservoir North Further Planning Area, located within the Lewis and Clark National Forest in Montana.

BLM issued the leases to Kohlman effective March 1, 1982. On February 10, 1982, the Bob Marshall Alliance, in conjunction with the Sierra Club Legal Defense Fund, filed suit in the U.S. District Court for the District of Montana seeking cancellation of the leases on the basis that

they were issued in violation of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4334 (1982), and section 7 of the Threatened and Endangered Species Act (ESA), 16 U.S.C. § 1539 (1982). In Bob Marshall Alliance v. Watt, 685 F. Supp. 1514, 1523 (D. Mon. 1986), the District Court ruled in favor of the Bob Marshall Alliance on each count of its complaint, stating as follows: "[T]he actions of the defendant agencies, allowing the issuance of oil and gas leases in the Deep Creek Area, are HEREBY SET ASIDE. The defendant agencies are enjoined from making further recommendations to lease and issuing leases pending compliance with NEPA, agency regulations, and the ESA." BLM, Forest Service (FS), and Kohlman appealed the District Court's decision to the Ninth Circuit Court of Appeals.

In Bob Marshall Alliance v. Hodel, 852 F.2d 1223 (9th Cir. 1988), the Ninth Circuit distinguished the leases involved in the litigation on the basis of whether or not they contained a "no surface occupancy" (NSO) stipulation, 1/ ruling that BLM and the FS violated NEPA by issuing non-NSO leases on Deep Creek without first preparing an EIS. 2/ Moreover, the court ruled that BLM and the FS violated NEPA by issuing all leases involved without adequate consideration of the no-action alternative, and that they violated the ESA by issuing the leases without preparation of a comprehen-sive biological opinion which assesses the effects of leasing and post-leasing activities on threatened and endangered species in the Deep Creek area. The parties raised questions before the Ninth Circuit as to the

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1/ The importance of this distinction derives from Sierra Club v. Peterson, 717 F.2d 1409 (D.C. Cir. 1983), and Conner v. Burford, 836 F.2d 1521 (9th Cir. 1988). In Conner v. Burford, supra, the Ninth Circuit considered, inter alia, whether BLM and the FS violated NEPA by selling oil and gas leases on 1,300,000 acres of national forest land in Montana without preparing an environmental impact statement (EIS). The Ninth Circuit followed the District of Columbia Circuit's approach in Peterson in dividing the leases into either "NSO [no surface occupancy] leases" or "non-NSO leases," depending upon whether the lease contained an NSO stipulation, and held that the sale of a non-NSO lease constitutes the point at which there is an "irreversible, irretrievable, commitment of resources" which triggers the requirement of an EIS. The Court ruled that "unless surface-disturbing activities may be absolutely precluded, the government must complete an EIS before it makes an irretrievable commitment of resources by selling non-NSO leases." 836 F.2d at 1532.

2/ Kohlman's leases do not include a NSO stipulation as defined by the Ninth Circuit ruling in Conner v. Burford, 836 F.2d 1521 (9th Cir. 1988). Like the leases in Conner v. Burford, Kohlman's leases "do not * * * preclude [Kohlman] from engaging in surface-disturbing activities altogether." 836 F.2d at 1529. Instead, Kohlman's leases are subject to a "Controlled or Limited Surface Use Stipulation" and a "Further Planning Area Stipulation." Both of these stipulations reserve unto the Government the right to regulate, not preclude, surface-disturbing activities.

effect of the District Court's order "setting aside" the leases already issued in the Deep Creek area. The Ninth Circuit stated as follows:

> In Conner, we found similar language to be unclear and undertook to clarify the order. 836 F.2d at 1541. Here we face an additional factor not present in Conner, namely the agencies' failure to consider the no action alternative. Under these circumstances we prefer to remand the action and allow the district court the first opportunity to clarify its order and to determine the specific steps to be taken with respect to the various Deep Creek leases. In doing so, the district court shall consider our decisions in this case and in Conner, as well as our recent opinions in Northern Cheyenne Tribe v. Hodel, 842 F.2d 224 (9th Cir. 1988), and Save the Yaak Committee v. Block, 840 F.2d 714 (9th Cir. 1988).

852 F.2d at 1230. The Ninth Circuit noted that in Conner v. Burford it had clarified the District Court's order to mean not that those leases were invalidated, but that BLM and the FS were enjoined "from permitting any surface-disturbing activity to occur on any of the leases until they have fully complied with NEPA and ESA." 836 F.2d at 1541. The Ninth Circuit in Bob Marshall Alliance v. Hodel remanded the case to the District Court for a clarification of its order and to determine the specific steps to be taken with respect to the various Deep Creek leases.

By letter dated August 22, 1986, in light of the District Court's order "setting aside" Kohlman's leases, the Mountain States Legal Foundation requested, on Kohlman's behalf, suspension of such leases and a refund of lease rentals paid, retroactive to March 2, 1982, the day after the leases were issued, pursuant to section 39 of the Mineral Leasing Act of 1920, 30 U.S.C. § 209 (1982). In its October 14, 1986, decision, BLM granted Kohlman's request effective the first day of May, 1986, the month in which the District Court issued its order "setting aside" the leases. However, BLM denied Kohlman's request for a suspension of operations and production from March 2, 1982, through May 1, 1986, with a refund of annual rentals paid from that date, providing the following explanation:

> Your request for a suspension effective March 2, 1982, is denied because the leases were available for development or other lease operations from date of issuance until the filing of the Court Order. The Forest Service has advised that seismic activity was done in and adjacent to the Deep Creek Further Planning Area. Since no Applications for Permit to Drill were filed on the leases there is no evidence you were "denied access to the leases," therefore, you are not entitled to relief for that period of time.
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> A suspension of operations and production is hereby granted for these leases in accordance with section 39 of the Mineral Leasing Act of 1920, 30 U.S.C. 209, and Regulation 43 CFR 3103.4-2. The suspension is effective May 1, 1986, the first of the month in which Order No. CV-82-015-GF was filed (May 27, 1986). The term of each lease and obligation to pay rental is

> also suspended effective May 1, 1986. Any rentals submitted for leases with a May 1, 1986, or subsequent anniversary date, will be retained unless you specifically request a refund. The rental will be appropriately applied to the leases following termination of the suspension.

(BLM Decision at 1).

In his statement of reasons (SOR) for appeal, Kohlman contends that "[f]rom the date of issuance, title has been clouded on the leases that are the subject of this appeal" (SOR at 3). He argues as follows:

> Through no fault of the Appellant, he has been denied access to and beneficial use of his leases because of the existence of a lawsuit seeking to set aside those leases as unlawfully issued in violation of NEPA, ESA and agency regulations. The decision of the District Court confirms the substantial doubt as to validity of the leases that has existed for the entire lease term. * * * [T]he fact of the matter is that Appellant's title to the leases was so clouded by the ongoing litigation that the leases were not available for development or operations. Moreover, seismic activity is irrelevant to this issue: it does not constitute lease activity and could take place regardless of the Court's decision on the legality of the leases. Finally, application for a permit to drill is not required to establish a denial of access to the leases where litigation establishes an independent basis for the denial.

(Id. at 3-4). Kohlman emphasizes that "[t]he final determination of [the District Court], subject to appeal, is that the leases were 'set aside' as of the date of issuance" (Id. at 5). That being the case, in Kohlman's view, BLM should have granted his request for suspension of the leases retroactive to that date.

[1] Section 39 of the Mineral Leasing Act (MLA), 30 U.S.C. § 209 (1982), under which Kohlman argues BLM should have suspended his leases retroactive to the date when they were issued, with refund of rental payments made from that date, provides in pertinent part as follows:

> In the event the Secretary of the Interior, in the interest of conservation, shall direct or shall assent to the suspension of operations and production under any lease granted under the terms of this Act, any payment of acreage rental or of minimum royalty prescribed by such lease likewise shall be suspended during such period of suspension of operations and production; and the term of such lease shall be extended by adding any such suspension period thereto. [Emphasis added.]

The regulation concerning lease suspension, 43 CFR 3103.4-2(d), reiterates section 39 of the MLA:

> Rental and minimum royalty payments shall be suspended during any period of suspension of all operations and production directed or assented to by the authorized officer beginning with the first day of the lease month in which the suspension of all operations and production becomes effective, or if the suspension of operations and production becomes effective on any date other than the first day of a lease month, beginning with the first day of the lease month following such effective date.

The Department has taken the position that a suspension of operations and production under section 39 of the MLA must be a suspension such that the lessee has been denied beneficial use of the lease by the Department in the interest of conservation. 3/ See "Oil & Gas Lease Suspension," Solicitor's Opinion, 92 I.D. 293 (1985).

Kohlman argues that "[s]uspending operations in the interest of avoiding environmental harm constitutes a suspension in the interest of conservation" (SOR at 7). In support of this contention, Kohlman cites Copper Valley Machine Works, Inc., 653 F.2d 595 (D.C. Cir. 1981), in which Copper Valley argued that a "restriction in a drilling permit prohibiting summer drilling in the interest of conservation worked a 'suspension of operations and production' that would extend the life of an oil and gas lease" under section 39 of the MLA. 653 F.2d at 597. The parties agreed that carrying on drilling operations during the summer months would have substantially damaged the permafrost character of the leasehold area. The court agreed with Copper Valley, reasoning as follows:

> Preventing such damage is obviously in the interest of conservation if that term is to receive its ordinary meaning. While the prevention of environmental damage may not have been the "conser-vation" that Congress principally had in mind in 1933 when it passed § 209, suspending operations to avoid environmental harm is definitely a suspension in the ordinary sense of the word. And there was no indication that Congress intended that "conservation" be given any interpretation other than its ordinary meaning. [Footnotes omitted].

653 F.2d at 600.

3/ "'Beneficial use' refers to all operations under the lease except for those necessary to maintain or preserve the well or mine workings, to conduct reclamation work or to protect the leased lands, natural resources, or public health and safety." Solicitor's Opinion, "Suspensions of Operations & Production for Coal Leases under Section 39 of the Mineral Leasing Act," 96 I.D. 15 (July 14, 1988).

In Copper Valley, the court rejected the Secretary's argument that section 209 of the MLA "was designed by Congress to cover only unanticipated interruptions of drilling." 653 F.2d at 602. The court quoted the following passage from the Congressional report, which explains that section 39 was intended to

> relieve lessees of coal and oil lands from the necessity of paying prescribed annual acreage rental, during periods when operations or production is suspended, in the interest of conservation, either by direction or assent of the Secretary of the Interior, and [provides] that the period of such suspension shall be added to the term of the lease.
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> The obvious fairness of such a provision would seem to render unnecessary any extended comment in its support. That which can-not be productive of any returns to the lessee, by reason of the direction or assent of the lessor, should not be made a liability by requiring the lessee to pay annual acreage rental.
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> Where, by reason of the positive directions of the Secretary of Interior, or by mutual assent of the Secretary and of the lessee, production is prohibited from the leased area, the suspen-sion period surely should not be counted as a part of the pre-scribed term. Hence the provision that such suspension period shall be added to the life of the lease.

(H.R. Rep. No. 1737, 72d Cong., 1st Sess. 2-3 (1932)).

In Bob Marshall Alliance v. Watt, supra, the District Court "set aside" Kohlman's leases, and in Bob Marshall Alliance v. Hodel, the Ninth Circuit enjoined all activities under the provisions of the Deep Creek leases until all statutory requirements are met. BLM properly suspended Kohlman's leases under section 39 of the MLA, as interpreted and applied in Copper Valley, from May 1, 1986, first day of the month in which the District Court issued its order, until the Deep Creek litigation is concluded.

We now address whether BLM correctly denied Kohlman's request for a suspension and refund of rentals from March 2, 1982, through May 1, 1986, the month when the District Court ordered the leases "set aside." In its decision, BLM states that "[s]ince no Applications for Permit to Drill were filed on the leases there is no evidence you were 'denied access to the leases,' therefore, you are not entitled to relief for that period of time" (Decision at 1). Kohlman counters that the result of filing such an appli-cation "would only have exacerbated the litigation, prompting the environ-mental plaintiffs to move for a preliminary injunction until the District Court entered its final order" (SOR at 10). For the reasons explained below, we are unpersuaded by Kohlman's argument that these leases were

unavailable for development or other lease operations, because of pending litigation, from the date of issuance until the District Court's order.

We find this case distinguishable from Copper Valley, in which BLM issued the drilling permits involved therein subject to a prohibition against summer drilling. In Copper Valley, the court concluded that such a prohibition was in the interest of conservation within the terms of section 39 of the MLA. However, in this case, the Secretary has taken no such position with regard to the Deep Creek leases. BLM's denial of beneficial use of an oil and gas lease "in the interest of conservation" may reflect environmental concerns, as was the situation in Copper Valley. However, while the existence of litigation concerning whether an oil and gas lease was issued in violation of environmental laws may, in Kohlman's language, "cause a cloud on the lease title," such litigation does not effect a denial of beneficial use of the leases. In the present case, unlike Copper Valley, the Secretary never imposed or acquiesced in a suspension of operations on the leases prior to the time of the court order.

Our conclusion that BLM properly denied Kohlman's request for a suspen-sion for the period beginning with lease issuance on March 1, 1982, through May 1, 1986, is supported by the Board's decision in Lyra-Vega II Mining Association, 91 IBLA 378 (1986). In Lyra-Vega, the Board affirmed a deci-sion by BLM denying Lyra-Vega's petition for deferment of assessment work on placer mining claims. Lyra-Vega argued that a deferment was appropriate because the Navy had published a notice of withdrawal of the subject land, had denied permits for access to the claim sites, and had informed Lyra-Vega that any trespass activities would be referred to the proper law enforcement officers. Lyra-Vega stated that it intended to resolve the dispute with the Navy through litigation. The Board applied 30 U.S.C. § 28(b) (1982), which provides that assessment work on a mining claim may be deferred by the Secretary upon a showing "by the claimant of evidence * * * that * * * legal impediments exist which affect the right of the claimant to enter upon the surface of such claim or group of claims or to gain access to the boundaries thereof." (Emphasis added.) In denying Lyra-Vega's petition for deferment of assessment work, the Board reasoned as follows:

> The Board has had several occasions to consider what consti-tutes a sufficient legal impediment to access to justify granting a petition for deferment. In Portland General Electric Co., 29 IBLA 165 (1977), appellants asserted BLM officials threatened trespass action if they proceeded with assessment work on their mining claims located on previously withdrawn land. A lawsuit had been filed by appellants against the Department of the Interior challenging the validity of the withdrawal, which litigation was still pending. The Board held that no legal impediments to access existed which would have justified deferment where there had been no administrative determination with respect to the validity of the claims and litigation was pending in Federal court regarding the validity of the withdrawal. Id. at 167. Thus, the fact that

trespass charges have been threatened is not itself sufficient to justify deferment.

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> It is well established that the mere pendency of litigation concerning mining claims, in the absence of a decree enjoining petitioner from entry upon the claims, is insufficient to justify deferment. In Charlestone Stone Products, Inc., 32 IBLA 22 (1977), the Board decided an appeal from denial of deferment sought by a mining claimant whose claims had been successfully contested by the Department but upheld in the initial stages of judicial review which was still pending. The Board held that litigation regarding claims is not grounds for deferment where claimant has not been denied access. * * *.

91 IBLA at 382.

We conclude that this reasoning is equally applicable in the instant case. The possibility that development activity in the Deep Creek area might have resulted in an injunction does not warrant a suspension under section 39 of the MLA. In fact, such an injunction would substantiate Kohlman's claim that he was being denied beneficial use of his leases.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Montana State Office is affirmed.

Gail M. Frazier
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge